UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

---

Submitted April 10, 1996 Decided Oct. 15, 1996

No. 95-3473

---

LUNDELL MANUFACTURING COMPANY, INC.,

*Plaintiff-Appellant,*

—v.—

AMERICAN BROADCASTING COMPANIES, INC.,

*Defendant-Appellee.*

---

Rehearing and Suggestion for Rehearing En Banc
Denied Nov. 26, 1996*

---

Paul Dean Lundberg, argued, Sioux City, IA, *for plaintiff-appellant.*

Kasey W. Kincaid, argued, Des Moines, IA, *for defendant-appellee.*

---

* Chief Judge Richard S. Arnold, Judge McMillian, and Judge Murphy would grant the suggestion. Judge Magill took no part in the consideration or decision of this case.

---

Before

WOLLMAN, JOHN R. GIBSON, and HANSEN,
Circuit Judges.

---

JOHN R. GIBSON, *Circuit Judge*.

Lundell Manufacturing Company appeals from the district court's order granting American Broadcasting Companies judgment as a matter of law, and setting aside a jury verdict of just over one million dollars for Lundell on its libel action. ABC broadcast a story on "World News Tonight with Peter Jennings," reporting that a garbage recycling machine manufactured by Lundell "does not work." Lundell sued for libel, a jury returned a verdict in its favor, and the district court set aside the jury verdict. On appeal, Lundell argues that the district court erred in setting aside the jury verdict because there was substantial evidence that the "sting" of the defamatory statement was false. Lundell also contends that the court erred in setting aside the lost profits award because there was evidence of lost profits damages. We reverse.

On July 2, 1992, ABC broadcast a story on "World News Tonight with Peter Jennings" as part of the program's continuing "Anger in America" reports. Jennings introduced the story:

> Our final report tonight is about garbage, which in the case of a small rural county in Georgia, is making an awful lot of people angry. What we have here is another example of why people are frustrated or angered by government.

ABC reporter, Rebecca Chase, began the story by explaining the predicament of Berrien County taxpayers. An on-

screen graphic labeled "Garbage Tax" appeared at the beginning of the story, and Chase began her report:

> In this south Georgia county of tobacco farms and pecan groves, taxpayers are angry that they are stuck with a three million dollar debt for this garbage recycling machine that they never approved and *does not work*.

(Emphasis added).

The story continued with Chase interviewing an upset taxpayer, and then describing the background of the controversy:

> In 1988, Berrien County had no place to put its garbage because the landfill was full. So the county commission decided to buy this garbage machine with revenue bonds which do not require voter approval.

As Chase made this statement, television viewers saw a corresponding video showing the Lundell machine in Berrien County.

Further in the story, viewers were shown another recycling machine sorting solid waste as Chase stated:

> The machine was supposed to work like this one in Tennessee, sorting and recycling up to ninety percent of the county's garbage and paying for itself by selling the recycled materials and charging user fees. That is how then-commissioner Joe Stallings promised it would work here. It did not.

Chase then interviewed the former Commissioner, Joe Stallings, who stated: "There's nothing physically wrong with the machine. It's the people."

Chase continued:

> Stallings blames people for not giving the machine a chance. But most people here blame him for misleading them about how much it cost to operate the plant. It was five times more expensive than he said it would be. The machine turned the garbage into fuel pellets and compost, but no one found a buyer. So the unsold material

> piled up outside—nothing more than exposed trash. The state has now ordered the plant shut down as an environmental hazard.

The story then detailed citizen responses, including a class action lawsuit to void the taxpayers' obligation to pay for the recycling project. The story concluded by telling that Berrien County taxpayers now must have their garbage hauled to another county for disposal.

Lundell sued ABC, alleging that the statement that the recycling machine "does not work" falsely implied that the recycling machine was not mechanically operable.[1] ABC concedes that the recycling machine was mechanically sound, and that the reason Berrien County no longer used the machine was because the county could not sell the by-products at a price sufficient to cover the machine's operating expenses. ABC defends the statement, arguing that the phrase "does not work" accurately implied that the Lundell machine and Berrien County's recycling plan did not work as intended or promised because the system did not work in a financially viable manner.

ABC filed a motion for summary judgment, arguing that Lundell could not demonstrate that the statement that the machine "did not work" was false, and that the challenged statement was not actionable because it was substantially true. The district court ruled that Lundell must bear the burden of proving that the challenged statement was false. *See In re IBP Confidential Business Documents Litigation*, 797 F.2d 632, 647 (8th Cir.1986) (en banc), *cert. denied,* 479 U.S. 1088, 107 S.Ct. 1293, 1294, 94 L.Ed.2d 150 (1987). The court recognized, however, that even if the statement was false, Lundell could not recover for defamation if the "gist" or "sting" of the report was substantially true. *See Behr v. Meredith Corp.*, 414

---

[1] Lundell also alleged that two other statements in the story were defamatory: the statement that "no one found a buyer" for the fuel pellets produced by the machine, and the statement that "taxpayers are now forced to have their trash hauled to another county's landfill." The district court dismissed both of these claims, and Lundell does not raise these issues on appeal.

N.W.2d 339, 342 (Iowa 1987). Nevertheless, the court denied ABC's motion, holding that a disputed question of fact existed as to the "sting" of the report and, therefore, the jury must decide the question. At the close of Lundell's evidence, the court directed a verdict for ABC on Lundell's claim of actual malice. The court concluded that Lundell was a "private figure plaintiff" and, therefore, must show by a preponderance of the evidence that ABC breached the standard of care of reasonably prudent professional broadcast news employees in broadcasting the report. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347, 94 S.Ct. 2997, 3010-11, 41 L.Ed.2d 789 (1974); *Jones v. Palmer Communications, Inc.*, 440 N.W2d 884, 898 (Iowa 1989).

Following an eight-day trial, the jury returned a verdict for Lundell assessing $900,000 in damages for injury to reputation and $158,000 in damages for lost profits. Later, the court granted ABC's renewed motion for judgment as a matter of law, ruling that the news report was substantially true as a matter of law. The court also ruled that if it had not entered judgment as a matter of law, it would have set aside the $158,000 lost profits award because of insufficient evidence. Lundell appeals.

I.

A critical dispute in this case is over our standard of review. Lundell argues that there is substantial evidence that ABC's statement that the machine did not work is false, and, therefore, the court could not decide that the report was substantially true as a matter of law, and neither the district court nor this court can disturb the jury's finding.

Lundell argues that we are guided by our usual standard for reviewing a district court's decision to enter judgment as a matter of law. Under that standard, we ask whether there is sufficient evidence to support a jury verdict. *White v. Pence*, 961 F.2d 776, 779 (8th Cir.1992) (standard for granting a motion for judgment as a matter of law). We analyze the evidence in the light most favorable to Lundell, and we do not

weigh or evaluate the evidence or consider questions of credibility. *Id.* To sustain a motion for judgment as a matter of law, all the evidence must point one way and be susceptible of no reasonable inference sustaining Lundell's position. *Id.*

ABC, on the other hand, contends that we are not restrained in this First Amendment case by the deference ordinarily accorded jury findings. Citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), ABC argues that we must "make an independent examination of the whole record," unrestrained by the deference ordinarily afforded to the jury, in order to ensure that no "forbidden intrusion on the field of free expression" has occurred. *Id.* at 285, 84 S.Ct. at 729 (internal quotation and citation omitted).

To remove the chilling effect of defamation laws and to encourage "uninhibited, robust, and wide-open" debate, the Supreme Court created a constitutional rule protecting the good faith criticism of government officials in *New York Times*, 376 U.S. at 270-71, 84 S.Ct. at 720-21. Because freedoms of expression require "breathing space," *id.* at 272, 84 S.Ct. at 721-22, the Court held that the Constitution "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice.' " *Id.* at 279-80, 84 S.Ct. at 725. Actual malice is a statement made "with knowledge that it was false or with reckless disregard of whether it was false." Id. at 280, 84 S.Ct. at 726. To ensure no forbidden intrusion on these First Amendment liberties, an appellate court's review of a trial court's finding of actual malice is not controlled by the "clearly erroneous" standard of Federal Rule of Civil Procedure 52(a). *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 498-511, 104 S.Ct. 1949, 1958-65, 80 L.Ed.2d 502 (1984). "Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.' " *Id.* at 511, 104 S.Ct. at 1965.

The Supreme Court examined the protection for media defendants in suits brought by private individual in *Gertz*, 418 U.S. 323, 94 S.Ct. 2997. The Court determined that the *New York Times*' actual malice standard was inappropriate in suits brought by private persons attempting to prove injury to their reputation on a matter of public interest. *Id.* at 344-47, 94 S.Ct. at 3009-11. The Court nevertheless imposed two other constitutional limitations. First, the Court held that the states could not impose liability without fault. *Id.* at 346-47, 94 S.Ct. at 3010-11. Thus, a private figure cannot recover against a media defendant without showing that the statement at issue was false and the media defendant was at fault in publishing the statement. *Id.* at 347, 94 S.Ct. at 3010-11. Second, the Court held that the states could not permit recovery of presumed or punitive damages without a showing of actual malice. *Id.* at 349-50, 94 S.Ct. at 3011-12.

ABC argues that *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986), made the finding of falsity a constitutional rule requiring us to independently review the record to determine whether there has been any "forbidden intrusion on the field of free expression." *New York Times*, 376 U.S. at 285, 84 S.Ct. at 729.

In *Philadelphia Newspapers*, a series of newspaper articles linked the plaintiffs to organized crime. The Court decided that the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern. 475 U.S. at 777, 106 S.Ct. at 1564. After examining the case law concerning the constitutional limits on defamation suits, the Court explained:

> When the speech is of public concern and the plaintiff is a public official or public figure, the Constitution clearly requires the plaintiff to surmount a much higher barrier before recovering damages from a media defendant than is raised by the common law. *When the speech is of public concern but the plaintiff is a private figure, as in Gertz, the Constitution still supplants the standards of the common law, but the constitutional requirements are,*

> *in at least some of their range, less forbidding than when the plaintiff is a public figure and the speech is of public concern.* When the speech is of exclusively private concern and the plaintiff is a private figure, as in *Dun & Bradstreet* [*v. Greenmoss Builders, Inc.*, 472 U.S. 749, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985)] the constitutional requirements do not necessarily force any change in at least some of the features of the common-law landscape.

*Id.* at 775, 106 S.Ct. at 1563 (emphasis added).

The Court emphasized that "the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern." *Id.* at 777, 106 S.Ct. at 1564.

From this language in *Philadelphia Newspapers*, ABC argues that the findings of falsity and substantial truth are subject to constitutional rules requiring this court to independently evaluate the findings in a suit brought by a private figure against a media defendant. ABC contends that we cannot focus on the literal truth or falsity of the statement, but rather we must decide whether the challenged statement meets the constitutional requirements of a false statement. "Minor inaccuracies do not amount to falsity so long as 'the substance, the gist, the sting, of the libelous charge be justified.' " *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517, 111 S.Ct. 2419, 2433, 115 L.Ed.2d 447 (1991) (quoting *Heuer v. Kee*, 15 Cal.App.2d 710, 59 P.2d 1063, 1064 (1936)). A statement is not false unless "it would have a different effect on the mind of the reader from that which the pleaded truth would have produced." *Id.* (internal quotation omitted).

Lundell responds that the independent review mandated in *New York Times* only applies to a lower court finding of actual malice, and not to findings of falsity or substantial truth. Lundell argues that the issues of falsity and substantial truth are simply not controlled by the "constitutional rule" set forth in *New York Times*. Lundell points out that the court correctly instructed the jury on the false statement requirement and

ABC's defense of substantial truth, and we cannot overturn the findings of the jury.

There is no question that the independent review required by *New York Times* applies to a trial court finding of actual malice. 376 U.S. at 284-86, 84 S.Ct. at 728-29. *Accord Bose Corp.*, 466 U.S. at 514, 104 S.Ct. at 1967 ("We hold that the clearly-erroneous standard of Rule 52(a) of the Federal Rules of Civil Procedure does not prescribe the standard of review to be applied in reviewing a determination of actual malice in a case governed by *New York Times Co. v. Sullivan*."). Here, however, we are not reviewing a finding of actual malice. The district court categorized Lundell as a private figure plaintiff. Thus, the issue boils down to whether findings of falsity or substantial truth are constitutional rules requiring us to independently evaluate the record.

When the Court in *Philadelphia Newspapers* discussed overriding the common law because of First Amendment protections, it focused on the allocation of the burden of proof. *See* 475 U.S. at 777, 106 S.Ct. at 1564. The Pennsylvania Supreme Court, reversing the trial court, held that a Pennsylvania statute placed the burden of proving truth on the publisher, and that this did not violate the Federal Constitution. *Id.* at 770-71, 106 S.Ct. at 1561-62. The Supreme Court reversed, holding that the common-law presumption that defamatory speech is false is unconstitutional when a plaintiff seeks damages against a media defendant for speech of public concern. *Id.* at 777, 106 S.Ct. at 1564. The Court identified the burden of proof, not the element of falsity, as the constitutional requirement. To decide the case, the Court only held that the Constitution placed the burden of proving falsity on the plaintiff. Indeed, the Court emphasized that it did not consider what quantity of proof of falsity that a private figure plaintiff must present to recover. *Id.* at 779 n. 4, 106 S.Ct. at 1565 n. 4; *Accord Bose Corp.*, 466 U.S. at 514 n. 31, 104 S.Ct. at 1967 n. 31 (commenting that there might be many other questions of fact in a defamation case that are irrelevant to the constitutional standard of *New York Times*

*Co. v. Sullivan,* and to which a "clearly erroneous" standard of appellate review applies).

In *Masson,* the Supreme Court addressed whether a writer's alteration of quotations attributed to the subject of an interview could establish the actual malice required for a defamation suit by a public figure. 501 U.S. at 499, 111 S.Ct. at 2424. The Supreme Court's analysis of actual malice required it to consider the concept of falsity. *Id.* at 513, 111 S.Ct. at 2431. The Court examined six different published passages to determine whether the published passages were materially different from the tape-recorded statements, thereby creating an issue of fact for the jury as to falsity. *Id.* at 522-25, 111 S.Ct. at 2435-37. The Court concluded that one of the passages did not materially alter the meaning of the tape-recorded statement and therefore, was not actionable. *Id.* at 524, 111 S.Ct. at 2436-37. With respect to the other five passages, however, the Court decided that a reasonable jury could find a material difference between the meaning of the published passages and that of the tape-recorded statements. *Id.* at 522-25, 111 S.Ct. at 2435-37. Because a jury could find the differences in the statements exposed the interviewee to contempt, ridicule, or obloquy, the Court held that it could not decide the issue of falsity as a matter of law. *Id. Masson* makes abundantly clear that in reviewing a summary judgment ruling, which involves a similar standard as a review of a directed verdict ruling, we examine the evidence in the light most favorable to the plaintiff and decide if there is sufficient evidence to support a jury finding of falsity. *Id.* at 520-21, 111 S.Ct. at 2434-35.[2]

Recently, we reviewed the district court's grant of summary judgment to a defendant television station on a defamation

---

[2] "On summary judgment, we must draw all justifiable inferences in favor of the nonmoving party, including questions of credibility and of the weight to be accorded particular evidence." *Masson,* 501 U.S. at 520, 111 S.Ct at 2435 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513-14, 91 L.Ed.2d 202 (1986)). We examine the evidence in a light most favorable to the nonmoving party, to see if there is sufficient evidence to support a jury finding. *Anderson,* 477 U.S. at 255, 106 S.Ct. at 2513-14.

claim. *Toney v. WCCO Television, Midwest Cable & Satellite, Inc.*, 85 F.3d 383 (8th Cir.1996). We reversed the district court's grant of summary judgment as to one of the seven statements alleged to be defamatory. *Id.* at 389. The district court ruled that the statement was not actionable because even if the statement was defamatory, it was true. *Id.* at 386. In an opinion written by Justice White, we agreed with the district court's conclusion that one of the statements "could be defamatory," and, therefore, the issue was one for a jury to decide. *Id.* at 388. We disagreed, however, with the district court's conclusion that the statement was "so plainly true that it could be so characterized as a matter of law." *Id.* We directed that this question should be decided by a jury. *Id.* at 389.

This is not a situation where the underlying facts as to the gist or sting of the defamatory charge are undisputed so that the trial court may determine substantial truth as a matter of law. *Compare Campbell v. Quad City Times, Inc.*, 547 N.W.2d 608, 610 (Iowa. Ct.App.1996), *with Jones,* 440 N.W.2d at 891. As the Third Circuit held *in Schiavone Construction Co. v. Time, Inc.*, "a jury must resolve the question of the sting because reasonable persons could differ on that question." 847 F.2d 1069, 1084 (3d Cir.1988).

There are other issues in defamation actions which courts have reserved for the jury to decide. For example, in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990), the Supreme Court rejected the argument that opinions are absolutely protected by the First Amendment, *Id.* at 18-19, 110 S.Ct. at 2705-06, recognizing that "expressions of 'opinion' may often imply an assertion of objective fact," *Id.* at 18, 110 S.Ct. at 2705. The Court allowed the defamation action to go forward, ruling that a reasonable trier of fact could find that the so-called opinion could be interpreted as a false assertion of fact. *Id.* at 21, 110 S.Ct. at 2707. Had the Court believed it must independently decide whether a statement constituted a false statement of fact, the Court would not have used this inquiry. *Accord Partington v. Bugliosi,* 56 F.3d 1147, 1153 (9th Cir.1995) (stan-

dard for summary judgment is whether a reasonable factfinder could conclude that the statements imply a false assertion of objective fact).

*Philadelphia Newspapers, Masson,* and, in a sense, *Milkovich,* all point to our determination that the First Amendment commands in a defamation case brought by a private plaintiff against a media defendant only that we review the record to determine whether a reasonable trier of fact could find that the statement could be interpreted as a false assertion of fact. In essence, these cases support a sufficiency of the evidence analysis.

We are further supported in this conclusion by *Harte-Hanks Communications, Inc. v. Connaughton,* 491 U.S. 657, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989), where the Supreme Court, in reviewing an actual malice determination, stated that the clearly erroneous standard could be applied to the credibility determinations, but the reviewing court must determine whether the statements are the character which the First Amendment protects. *Id.* at 686-88, 109 S.Ct. at 2695-96. On review of the record, it agreed with the Court of Appeals that the evidence supported a finding of actual malice. *Id.* at 689, 109 S.Ct. at 2696-97.

Within the context of deciding whether there is substantial evidence to support the jury's finding of falsity, we must also discern whether there has been any intrusion on the protections of the First Amendment. Thus, if no reasonable jury could conclude that the statement was a false statement of material fact, the libel defendant is protected from a defamation suit. *See, e.g., Haynes v. Alfred A. Knopf, Inc.,* 8 F.3d 1222, 1228 (7th Cir.1993) ("The rule making substantial truth a complete defense and the constitutional limitations on defamation suits coincide."); *Campbell,* 547 N.W.2d at 610. The question of whether there has been any intrusion on First Amendment principles is seemingly subsumed in the inquiry as to whether there is substantial evidence to support the jury's findings as to falsity and substantial truth. *See, e.g., Norse v. Henry Holt & Co.,* 991 F.2d 563, 567 (9th Cir.1993) (summary judgment for author appropriate when no reason-

able jury could understand the statement, when read in context, to be defamatory); *Beverly Hills Foodland, Inc. v. United Food & Commercial Workers Union, Local 655*, 39 F.3d 191, 195-96 (8th Cir.1994) (summary judgment for union appropriate when its statements could not reasonably be read to be false assertions of fact).

II.

Regardless of our standard of review, ABC contends that the district court correctly granted judgment to it because Lundell did not prove the falsity of the statement. Alternatively, ABC argues that it is entitled to judgment as a matter of law because Lundell is a public figure for purposes of this action, and did not prove actual malice as defined in *New York Times*.

A.

In this diversity case, we review the district court's interpretation of Iowa law de novo, and give no deference to the district court's interpretation of state law. *Salve Regina College v. Russell*, 499 U.S. 225, 111 S.Ct. 1217, 113 L.Ed.2d 190 (1991). Of course, Iowa courts must apply the governing federal constitutional standards in this defamation case. *Toney*, 85 F.3d at 386.

In Iowa, libel "is the malicious publication, expressed either in printing or in writing, or by signs and pictures, tending to injure the reputation of another person or to expose the person to public hatred, contempt, or ridicule or to injure the person in the maintenance of the person's business." *Vinson v. Linn-Mar Community Sch. Dist.*, 360 N.W.2d 108, 115 (Iowa 1984) (internal citation and quotation omitted). Under Iowa law, whether a statement is defamatory "must be determined by giving to the subject-matter thereof, as a whole, that meaning which naturally belongs to the language used." *Kiner v. Reliance Ins. Co.*, 463 N.W.2d 9, 14 (Iowa 1990). Iowa recognizes substantial truth as an absolute defense in a defama-

tion action. *Palmer Communications*, 440 N.W.2d at 891. "The libel defendant need not establish the literal truth of every detail of the broadcast so long as the 'gist' or 'sting' of the broadcast in question is substantially true." *Id.* The "gist" or "sting" is determined by "looking at the highlight of the broadcast, the pertinent angle of it, and not to the items of secondary importance which are inoffensive details, immaterial to the truth of the defamatory statement." *Id.* (quoting *Behr*, 414 N.W.2d at 342).

ABC argues that the phrase "does not work" used as part of the description of events in Berrien County constitutes the use of language in accord with one of its accepted meanings, and, therefore, the phrase is not materially false. ABC expands on its argument by characterizing the phrase "does not work," as including more than Lundell's interpretation that the machine was mechanically inoperable. ABC explains that a publication is substantially true when the allegedly false statement involves the use of language consistent with an accepted meaning. Because the machine failed to function on a financially self-sufficient basis, failed to solve the county's waste disposal crisis, and had not operated since its permit had been suspended, ABC contends the phrase is substantially true.

In *Bose Corporation,* a manufacturer sued Consumer Reports based on statements disparaging a new type of Bose speakers. 466 U.S. at 487-88, 104 S.Ct. at 1952-54. The Court concluded that the statement was not an assessment of events that speak for themselves, but "one of a number of possible rational interpretations of an event that bristled with ambiguities and descriptive challenges for the writer." *Id.* at 512, 104 S.Ct. at 1966 (internal quotation omitted). The Court did not allow recovery for choice of language which, though perhaps reflecting a misconception, represented 'the sort of inaccuracy that is commonplace in the forum of robust debate to which the *New York Times* rule applies." *Id.* at 513, 104 S.Ct. at 1966. Similarly, in *Janklow v. Newsweek, Inc.*, 788 F.2d 1300 (8th Cir.) (en banc), *cert. denied*, 479 U.S. 883, 107 S.Ct. 272, 93 L.Ed.2d 249 (1986), we stated that we "will not make editorial judgments about specific word choice in order

to portray a plaintiff in the best possible light, particularly when the 'sting' of the implication . . . is still present when the full chronology is laid out." *Id.* at 1306.

Contrary to ABC's interpretation, the statement did not identify the system as not working, but the machine itself. The statement was specific: "[T]*his garbage recycling machine* . . . does not work." *See Kiner,* 463 N.W.2d at 14. The court used the exact words of the broadcast in submitting the question of falsity to the jury. The jury returned a general verdict in Lundell's favor, requiring it to find that the statement was false. The sting of the broadcast is the heart of the matter in question—the hurtfulness of the utterance. *Jones,* 440 N.W.2d at 891 (quoting *Behr,* 414 N.W.2d at 342). If the underlying facts as to the gist or sting are undisputed, substantial truth may be determined as a matter of law. *Jones,* 440 N.W.2d at 891; *Behr,* 414 N.W.2d at 342. Here, however, it is evident that the underlying facts as to the gist of the statement are the subject of a reasonable dispute, whether the statement goes to the operability of the machine, or its economic shortcoming. When the language used is capable of two meanings, including the one ascribed by a complainant, it is for the jury to decide the meaning conveyed. *Vinson,* 360 N.W.2d at 116. ABC's position that the statement "does not work" meant only that the machine did not operate in a financially viable manner is not expressly included in the story itself. Although Stallings said the machine worked and Chase later discussed the financial aspect of the machine, the story, as a whole, never clarified the original statement that the machine "does not work." The statement is not nearly as ambiguous as the statements in *Bose Corporation* or *Janklow.* The phrase "does not work" is specific and is not the sort of inaccuracy that is "commonplace in the forum of robust debate." *Masson,* 501 U.S. at 514, 111 S.Ct. at 2431 (quoting *Bose Corp.,* 466 U.S. at 513, 104 S.Ct. at 1966). We, therefore, cannot conclude that the story, as a whole, was substantially true as a matter of law.

There is substantial evidence from which a reasonable jury could conclude that the statement was false, and from which

a reasonable jury could conclude that the sting of the story was that the Lundell machine was mechanically inoperable. After carefully examining the videotape, we are satisfied that a reasonable jury could conclude from the plain meaning of the words used, that the statement that the machine "does not work" meant that the machine was inoperable. Even according ABC the independent review it requests, we are confident that there has been no forbidden intrusion on First Amendment principles.

This conclusion is reinforced by other evidence in the record. There is evidence that the very genesis of ABC's report was based on the false premise that the machine was broken. Chase initiated the story after reading an article in the *Atlanta Journal-Constitution* concerning the Berrien County facility and local government revenue bond financing. The article stated that the facility had financial problems, but it did not state that the Lundell machine did not work. Nevertheless, Chase prepared a proposal for a news story about the situation in Berrien County, and her proposal included the statement that the recycling machine "has never worked." Chase acknowledged at trial that she had not interviewed anyone with knowledge of the Berrien County facility before making her story proposal, and that she had no knowledge of who, if anyone, her producer, Elissa Weldon, had interviewed. Chase also admitted that at the time of the broadcast she believed that the machine had a broken main shredder, and this was one reason why she reported that the machine did not work. David Gaskins, the former plant manager for the Berrien County Resource Recovery facility, testified that the entire system, including the main shredder, was operable at the time ABC prepared its report. Others corroborated this testimony.

Before airing the story, Chase contacted Vernon Lundell. Lundell told Chase that the Lundell system in Berrien County worked, that opposition to the system was political, and that he had stayed out of the political dispute in Berrien County. A few days before the broadcast, Gary Lamberson, an independent sales representative for Lundell, contacted Chase and

advised her that any story on the Berrien County facility based on information provided only by local political opponents would not tell the true story of the facility. Lamberson urged Chase to interview the former plant managers to learn the true facts about operation of the system. Lamberson testified that Chase left him with the impression that she was "too busy" to conduct further interviews and that the story was "a done deal."

ABC contacted Gaskins to arrange filming of the recycling system. Gaskins was not interviewed by Chase or Weldon prior to the broadcast. No one from ABC ever asked Gaskins if the Lundell system was capable of processing garbage. When the ABC camera crew came to the recycling plant, one of the crew members remarked to Gaskins that he understood that the plant was broken down. Gaskins responded that all he needed was some garbage to process and "I'll fire it up." After ABC broadcast the story, Lundell contacted ABC seeking a retraction. ABC responded with a letter stating:

> Contrary to your letter, the report does not state that the "system" does not work. What the report does say is that the garbage recycling machine purchased by Berrien County does not work. This is in fact completely true. At the time of our broadcast the Berrien County machine was not functioning. As I am sure you are aware, the main shredder broke down and has not been repaired. Indeed the Georgia Department of Natural Resources has acted to close the facility down.

This evidence amply demonstrates that ABC actually believed that its broadcast stated that the machine was mechanically inoperable, and ABC does not dispute that the machine was mechanically sound. Accordingly, there is substantial evidence from which a reasonable jury could find that the sting of ABC's broadcast was false.

Finally, ABC contends that other parts of the story negate any false implication derived from the statement that the machine was mechanically inoperable: (1) the report included footage showing the machine operating; (2) the report noted

that the machine did turn garbage into fuel pellets and compost and showed fuel pellets made by the machine; (3) the report included the express statement that "there's nothing physically wrong with the machine. It's the people"; and (4) the report showed footage of another Lundell machine operated by Tennessee officials.

These other parts of the story do not change our conclusion.[3] The report did not actually show the machine operating, but only included footage showing a worker sorting garbage and fuel pellets made by the machine. The conclusion drawn from the footage of the Tennessee machine is also inconsistent with ABC's argument. Along with the footage showing the Tennessee machine, Chase states:

> The machine was supposed to work like this one in Tennessee, sorting and recycling up to ninety percent of the county's garbage and paying for itself by selling the recycled materials and charging user fees. That is how then-commissioner Joe Stallings promised it would work here. It did not.

A reasonable jury could easily conclude from Chase's comparison of the Berrien County machine with the Tennessee machine that the Tennessee machine worked, and the Berrien County machine did not. *Cf. Treutler v. Meredith Corp.*, 455 F.2d 255, 258 (8th Cir. 1972). Although Stallings stated that there was nothing physically wrong with the machine, a reasonable juror could discredit the statement, as the story painted Stallings as someone who had misrepresented the machine to the Berrien County taxpayers.

For these reasons, we conclude there is a disputed question of fact as to the sting of the story, and substantial evidence to support the jury's finding of a false statement, making the dis-

---

[3] ABC also argues that the district court correctly granted it judgment as a matter of law because Lundell failed to sustain its burden of proving: (1) that the broadcast was "of and concerning" Lundell; and (2) that ABC violated the standard of care practiced by professional journalists. We have carefully considered these arguments and conclude there is substantial evidence to support the jury's findings.

trict court's entry of judgment for ABC erroneous. We reverse the district court's entry of judgment for ABC as a matter of law.

B.

ABC argues in the alternative that the district court's ruling may he upheld because Lundell is a public figure for the purpose of this action, and did not prove actual malice as defined in *New York Times*.

The determination of a plaintiff's status as a private or public figure is an issue of law. *Bagley*, 797 F.2d at 644; *Jones*, 440 N.W.2d at 894 (determination of plaintiff's status is a question of law governed by federal constitutional law).

In *Gertz*, the Court identified two categories of public figures to whom the New *York Times* standard applies:

> The first category is "general purpose" public figures, those who have attained a position "of such persuasive power and influence," and of "such pervasive fame or notoriety," that he or she may be considered "a public figure for all purposes and in all contexts." The second, more common, type of public figure is the "limited purpose" public figure. The court defined this type as a person who voluntarily injects himself or are drawn into a particular public controversy, and thereby becomes a public figure for a limited range of issues.

418 U.S. at 351, 94 S.Ct. at 3013. The Court also noted that "[h]ypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare." *Id.* at 345, 94 S.Ct. at 3009.

In determining whether an individual should be considered a limited public figure, we must focus our attention on the "nature and extent of an individual's participation in the particular controversy giving rise to the defamation." *Gertz*, 418 U.S. at 352, 94 S.Ct. at 3013. By so doing, we then can determine whether the individual has voluntarily and purposefully

injected himself into that controversy in an attempt to influence the resolution of the controversy. *Id.* at 345, 94 S.Ct. at 3009-10.

Applying these factors, we must first identify the particular public controversy giving rise to the defamatory speech. *Bagley,* 797 F.2d at 645. Here, the particular controversy giving rise to ABC's report was the garbage disposal problem in Berrien County. This controversy is clearly a public controversy involving questions of "public concern." *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,* 472 U.S. 749, 761-62, 105 S.Ct. 2939, 2946-47, 86 L.Ed.2d 593 (1985) (plurality opinion); *Waldbaum v. Fairchild Publications, Inc.,* 627 F.2d 1287, 1296-97 (D.C.Cir.) (defining a public controversy as one raising issues that might reasonably be expected to have an impact beyond the parties directly enmeshed in the particular controversy), *cert. denied,* 449 U.S. 898, 101 S.Ct. 266, 66 L.Ed.2d 128 (1980); *Johnson v. Nickerson,* 542 N.W.2d 506, 511 (Iowa 1996) (same).

After identifying the particular controversy giving rise to the defamation, we then examine the "nature and extent" of Lundell's involvement. *Bagley,* 797 F.2d at 645. This inquiry is necessary to determine whether Lundell has "thrust [itself] to the forefront of [this] particular public controvers[y] in order to influence the resolution of the issues involved." *Gertz,* 418 U.S. at 345, 94 S.Ct. at 3009.

The Supreme Court faced a situation very similar to this case in *Hutchinson v. Proxmire,* 443 U.S. 111, 99 S.Ct. 2675, 61 L.Ed.2d 411 (1979). Hutchinson did research with primates and received research grants from three federal agencies. *Id.* at 115, 99 S.Ct. at 2678. Senator William Proxmire began a public campaign to expose wasteful government spending by giving a "Golden Fleece" award to federal agencies who funded what Proxmire considered to be wasteful projects. *Id.* at 114, 99 S.Ct. at 2677-78. After denying protection under the Speech and Debate Clause, *id.* at 123-33, 99 S.Ct. at 2682-87, the Court reversed lower court rulings that Hutchinson was a public figure, *id.* at 133-36, 99 S.Ct. at 2687-89. The Court observed that Hutchinson's activities and public

profile were like many members of his profession, and that his public writings reached a relatively small category of professionals concerned with research in human behavior. *Id.* at 135, 99 S.Ct. at 2688. "To the extent the subject of his published writings became a matter of controversy, it was a consequence of the Golden Fleece Award." *Id.* The Court emphasized that, "those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." *Id.* The Court also reasoned that Hutchinson did not "thrust himself or his views into public controversy to influence others," and at most, the public controversy consisted of concerns about general public expenditures. *Id.* The Court rejected the arguments that Hutchinson's applications for and receipt of federal grants and publications in professional journals elevated him to public figure status. *Id.* The Court's determination was also influenced by the fact that Hutchinson's only access to the media was limited to responding to the announcement of the Golden Fleece award, and that Hutchinson did not have regular and continuing access to the media, one of the accouterments of being a public figure. *Id.* at 136, 99 S.Ct. at 2688-89.

The Supreme Court also reversed lower court rulings that a plaintiff was a limited purpose public figure in *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157, 99 S.Ct. 2701, 61 L.Ed.2d 450 (1979). There, publishers of a book described Wolston as being a Soviet agent. *Id.* at 159, 99 S.Ct. at 2703. Sixteen years before the book's publication, Wolston had received newspaper coverage because he had failed to comply with a grand jury subpoena and had been subject to contempt proceedings. *Id.* at 162-63, 99 S.Ct. at 2704-05. Although Wolston's decision not to appear before a grand jury was likely to attract media attention, the Court concluded that this was not the type of activity that established public figure status. *Id.* at 167, 99 S.Ct. at 2707. Wolston did not discuss the matter with the press, and limited his involvement to defending the contempt charges. Furthermore, Wolston did not fail to appear in order to influence the public with respect to any controversy, and did not voluntarily thrust or inject himself

into the controversy concerning Soviet espionage. *Id.* at 168, 99 S.Ct. at 2707-08. The Court said: "It would be more accurate to say that [Wolston] was dragged unwillingly into the controversy." *Id.* at 166, 99 S.Ct. at 2707. "A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention." *Id.* at 167, 99 S.Ct. at 2707. "A libel defendant must show more than mere newsworthiness to justify application of the demanding burden of *New York Times*." *Id.* at 167-168, 99 S.Ct. at 2707.

Lundell's status mirrors that of Hutchinson. Lundell did not inject itself into the Berrien County controversy. *See Bagley*, 797 F.2d at 645-46. *Cf. National Found. for Cancer Research, Inc. v. Council of Better Business Bureaus, Inc.*, 705 F.2d 98, 101-02 (4th Cir.), *cert. denied*, 464 U.S. 830, 104 S.Ct. 108, 78 L.Ed.2d 110 (1983). Indeed, Chase admitted that she "did not uncover any evidence from any source that [Lundell] had attempted to inject [itself] into [the] political debate of Berrien County." Although Lundell contracted with the county for the sale of the machine, the Supreme Court makes clear in *Hutchinson* and *Wolston* that it is the plaintiff's role in the controversy, not the controversy itself, that is determinative of public figure status. *See Hutchinson*, 443 U.S. at 135, 99 S.Ct. at 2688; *Wolston*, 443 U.S. at 167, 99 S.Ct. at 2707. Even though the garbage disposal problem was a matter of public concern, we focus on Lundell's role in the controversy, not the public nature of the controversy itself. ABC does not direct us to any evidence that Lundell placed itself into the controversy to influence the issues involved. *See Gertz*, 418 U.S. at 351-52, 94 S.Ct. at 3012-13 (plaintiff not a limited purpose public figure even though he represented a client on a matter related to the controversy at issue). Furthermore, ABC cannot, by its own conduct, create its own defense by making Lundell a public figure. Like the circumstances in *Hutchinson*, there is no evidence that Lundell had access to the media to refute the ABC report. 443 U.S. at 136, 99 S.Ct. at 2688-89. Indeed, ABC denied Lundell's request for a retraction of the story. For these reasons, we reject ABC's alternative argument.

## III.

ABC attacks the award of damages on several grounds. First, ABC contends that Lundell cannot recover separate damages for reputational harm and lost profits. Second, ABC contends Lundell failed to prove actual damages and lost profits. The district court instructed the jury to consider three different types of loss: damage to reputation, past lost profits, and future lost profits. The jury awarded no damages for future lost profits, $158,000 for past lost profits, and $900,000 for damage to reputation.

### A.

Citing *Martin Marietta Corp. v. Evening Star Newspaper Co.*, 417 F.Supp. 947 (D.D.C. 1976), ABC argues that a corporation cannot recover for both lost profits and injury to reputation.

> The law of libel has long reflected the distinction between corporate and human plaintiffs by limiting corporate recovery to actual damages in the form of lost profits . . . "Although a corporation may maintain an action for libel, *it has no personal reputation* and may be libeled only by imputation about its financial soundness or business ethics."

*Id.* at 955 (quoting *Golden Palace, Inc. v. National Broadcasting Co.*, 386 F.Supp. 107 (D.D.C.1974)).

ABC sets forth a policy argument that we should adopt the reasoning of the district courts of the District of Columbia. The Iowa courts, however, appear to uniformly allow business entities to recover damages for injury to their reputation as well as lost profits. *See, e.g., Vojak v. Jensen,* 161 N.W.2d 100, 106, 110-11 (Iowa 1968); G & H *Soybean Oil, Inc. v. Diamond Crystal Specialty Foods, Inc.*, 796 F.Supp. 1214, 1217 (S.D.Iowa 1992) (applying Iowa law). We therefore reject ABC's argument.

We also reject ABC's argument that there is insufficient proof of actual damages. Vernon Lundell testified that Lundell began operating in 1945 and had always had an excellent reputation in the industry and in Iowa. Another witness testified that just before the broadcast, Lundell was the industry leader for this type of equipment. Several witnesses testified that after the broadcast, interest in the machine vanished. It is undisputed that Lundell never sold another machine following the broadcast. This evidence is more than sufficient to sustain the jury's finding that Lundell was damaged by the story. There is also competent evidence to support the jury's monetary award. *See Gertz,* 418 U.S. at 350, 94 S.Ct. at 3012. The historical sales data, as well as evidence that Lundell spent $2 million dollars in the development of the recycling system, constitutes competent evidence of the dollar value of the injury.[4] *See id.*

B.

ABC contends that even if we reverse the district court's entry of judgment, we must affirm the court's alternative ruling that Lundell failed to prove lost profits resulting from the broadcast. ABC contends that in order to recover lost profits, Lundell must identify the sales it lost because of the report.

Lundell contends that the district court can only reverse the jury verdict if the verdict is against the great weight of the evidence. *See White,* 961 F.2d at 780. Lundell confuses the standard for reviewing a ruling on a motion for a new trial on the ground that the verdict is against the weight of the evidence with the standard for reviewing a ruling on a motion for judgment as a matter of law. *Id.* at 779-80. Here, the district court entered judgment as a matter of law because there was a lack of evidence of lost profits. Accordingly, our standard of review is whether there is sufficient evidence to support the verdict, not whether the verdict is against the great weight of the evidence. *See id.*

---

[4] For those reasons, we also reject ABC's contenion that the award is excessive.

The level of proof required to establish the exact amount of lost profits is not as high as the level of proof required to establish that some loss occurred. *Orkin Exterminating Co. v. Burnett*, 160 N.W.2d 427, 430 (Iowa 1968). As the Iowa Supreme Court explained:

> Courts have recognized a distinction between proof of the fact that damages have been sustained and proof of the amount of those damages. If it is speculative and uncertain whether damages have been sustained, recovery is denied. If the uncertainty lies only in the amount of damages, recovery may be had if there is proof of a reasonable basis from which the amount can be inferred or approximated.

*Id.*

The Iowa Supreme Court has rejected the argument that a plaintiff must identify specific lost sales to recover lost profits damages. *Page County Appliance Ctr., Inc. v. Honeywell, Inc.*, 347 N.W.2d 171, 178 (Iowa 1984). Decreased income after the defendant's damaging conduct is sufficient to support an award for lost profits so long as the record discloses a reasonable basis from which the amount can be inferred or approximated. *Id.* "Simply because the loss of profits cannot be shown with precision, defendant who caused the damages, may not be heard to say that no damages may be awarded." *Orkin*, 160 N.W.2d at 430 (quoting *Exercycle of Mich. Inc. v. Wayson*, 341 F.2d 335, 337 (7th Cir. 1965)).

The district court set aside the lost profits award for two reasons. First, it concluded that there were "tremendous problems" with the machines sold by Lundell, and that Lundell had to take back most machines it sold through litigation or otherwise. Second, the court concluded that Lundell's evidence concerning lost sales was inconsistent. Vernon Lundell testified that Lundell would have sold over twenty systems in the two years following the story. Vernon Lundell's son-in-law and vice-president of the company, Steve Paulsen, testified that he thought the company could have only sold four systems.

Although Lundell's and Paulsen's testimony is inconsistent, it does not cause us to conclude that there was no reasonable basis for calculating lost profit damages. The jury was free to accept or reject the opinion of either one of these witnesses. The discrepancy between the two witnesses does not make the damage amounts lacking in a reasonable basis, but only demonstrates the opinions of different witnesses. Further, there was other evidence to support the lost profits award. First, there was evidence that before the report there was substantial interest in the Lundell machine, and following the report, Lundell could not sell a single machine. There was evidence that in the years before the report, Lundell sold an average of two recycling systems per year, and that each machine had a gross profit of approximately $240,000. The historical sales figures for the years preceding the story also provide a reasonable basis for approximating lost profits damages. Indeed, Lundell earned $158,000 in 1987 on sales of over $1.5 million, representing the sale of one machine.

Furthermore, the issue of whether the machines had "tremendous problems" was conflicting. Lundell presented extensive evidence that the defamatory statements in the ABC report killed interest and sales of the Lundell machine. ABC refuted this theory, presenting evidence that the loss of sales was caused by intrinsic problems with the machine. There was evidence supporting both theories, and it was an issue for the jury, not the court, to resolve.

Thus, we conclude that a reasonable basis existed to support an award of lost profits. We reverse the district court's alternative ruling setting aside the lost profits award.

We reverse the district court's entry of judgment for ABC. We remand to the district court with directions that the court reinstate the jury verdict for Lundell and award of damages for Lundell, including damages for lost profits.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

---

No. C92-4060
Filed: September 28, 1995

---

LUNDELL MANUFACTURING COMPANY, INC.,

*Plaintiff,*

—VS.—

AMERICAN BROADCASTING COMPANIES, INC.,

*Defendant.*

---

ORDER

This matter comes before the court pursuant to plaintiff's Motion to Alter or Amend Judgment, Docket #104; defendant's Motion for Judgment as a Matter of Law or for a New Trial, Docket #106; and defendant's Motion to Exceed Page Limitation, Docket #109. The court held oral argument on these motions. Defendant's Motion for Judgment as a Matter of Law is granted. Defendant's Motion for a New Trial is denied as moot. Plaintiff's Motion to Alter or Amend Judgment is denied as moot. Defendant's Motion to Exceed Page Limitation is granted.

This is an action for libel arising out of the July 2, 1992 broadcast of "World News Tonight with Peter Jennings" in which ABC broadcast a story by employee Rebecca Chase concerning a solid waste recycling system in Berrien County, Georgia. The recycling system was manufactured by the

plaintiff Lundell Manufacturing Company. Lundell claimed that the news report was libelous as to it in three respects. First, the broadcast stated that taxpayers in Berrien County, Georgia "are angry that they are stuck with a $3 million debt for this garbage recycling machine that they never approved and does not work." The second statement was that "the machine turned the garbage into fuel pellets and compost, but no one found a buyer." Finally, the report stated, "Taxpayers are now forced to have their trash hauled to another county's landfill fifty miles away and pay yet again to get rid of their garbage."

In an order filed April 13, 1994, the court dismissed the third specification of libel pursuant to the defendant's Motion for Summary Judgment. The case proceeded to trial and, at the close of the plaintiff's case, the court directed a verdict in favor of the defendant with respect to the second statement. Accordingly, the case went to the jury on the sole claim arising out of the statement that the garbage recycling machine "did not work." The jury returned a verdict in favor of the plaintiff in the amount of $1,058,000 which consists of lost profit damages in the amount $158,000 and $900,000 damage to the company's reputation.

MOTION FOR JUDGMENT AS A MATTER OF LAW

Pursuant to Federal Rule of Civil Procedure 50(b):

Renewal of Motion for Judgment After Trial; Alternative Motion for New Trial. Whenever a motion for a judgment as a matter of law made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Such a motion may be renewed by service and filing not later than ten days after entry of judgment. A motion for a new trial under Rule 59 may be joined with a renewal of the motion for judgment as a matter of law, or a new trial may be requested in the

> alternative. If a verdict was returned, the court may, in disposing of the renewed motion, allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as a matter of law. If no verdict was returned, the court may, in disposing of the renewed motion, direct the entry of judgment as a matter of law or may order a new trial.

A motion for judgment as a matter of law presents a legal question to the district court as to whether there is sufficient evidence to support a jury verdict. The evidence is viewed in a light most favorable to the prevailing party and the court must not engage in a weighing or evaluation of the evidence or consider questions of credibility. *Smith v. World Insurance Company*, 38 F.3d 1456, 1460 (8th Cir. 1994). This is the same rigorous standard that the court employed when considering motions for judgment notwithstanding the verdict. *Larson By Larson v. Miller*, 55 F.3d 1343, 1348, n.3 (8th Cir. 1995).

The court must (a) consider the evidence in the light most favorable to the prevailing party; (b) assume that the jury resolved all conflicts of evidence in favor of that party; (c) assume as true all facts which that party's evidence tended to prove; (d) give that party the benefit of all favorable inferences which may reasonably be drawn from the proved facts; and (e) deny the motion if in light of the above reasonable jurors could differ as to the conclusions that could be drawn from the evidence. *Farley v. Henson*, 11 F.3d 827, 831 (8th Cir. 1993).

The Eighth Circuit Court of Appeals has recently noted that there is an issue as to whether state or federal law should be applied to motions for judgment notwithstanding the verdict in a diversity case. However, because the standards under federal and Iowa law are the same, the question has no significance in this case. *Chadima v. National Fidelity Life Insurance Company*, 55 F.3d 345, 347, n.5 (8th Cir. 1995).

In its Renewed Motion for Judgment as a Matter of Law, the defendant argues that the plaintiff failed to sustain its bur-

den of proving that the broadcast was "of and concerning" the plaintiff. This question was addressed early in the life of this case and was rejected in the context of a Motion for Judgment on the Pleadings. *See* Order, dated July 23, 1993, Docket #31.

At trial, the court leaned a great deal of information about the context in which ABC aired this story. It was done as a part of a series on taxpayer anger or activism in America. The court believed before trial and still believes that a reasonable juror could find that the focal point of anger in this case was on the purchase of a machine that did not work. Although Lundell is not named in the story, the Lundell logo can briefly be seen. Most importantly, the identity of the manufacturer of this machine that "did not work" would not be a secret to those in the industry or those contemplating the purchase of such a machine. Accordingly, the court found that the question as to whether the story was of and concerning the plaintiff should be submitted to the jury. The court believes that it accurately instructed the jury on this subject as the first element that the plaintiff was required to prove. *See* Instruction No. 3. The court is convinced that a jury issue was presented and that the jury was properly instructed on this element of the plaintiff's burden of proof.

The defendant also continues to argue that the plaintiff was a limited purpose public figure such that it would have to prove actual malice before it could recover damages. The court directed a verdict in favor of the defendant on the issue of actual malice. (Tr. 776).[1] No party has yet alleged error in this regard. Further, after a discussion of all the relevant factors with counsel, the court found that Lundell is a private-figure plaintiff. (Tr. 776-777). Again, the court is convinced that Lundell is a private-figure plaintiff as it has never thrust itself into public controversy and has simply sold machines to industries or endeavors that are significantly regulated. Lundell never attempted to influence the outcome of the public controversy in Berrien County, Georgia. When controversy arose, Lundell refused to get involved. An excellent discus-

---

[1] Transcript of trial, Volume 5.

sion of these same issues in an analogous context is found in *Jones v. Palmer Communications Incorporated*, 440 NW 2d 884 (Iowa 1989).

The defendant next argues that the plaintiff failed to produce expert testimony concerning the standard of care employed by journalists to assist the jury in determining whether the defendant was negligent in airing the story. The court again looked to *Jones v. Palmer Communications, supra*, in which the Supreme Court of Iowa held that custom in the trade is relevant but not controlling. The Supreme Court also looked to the factors set forth in Restatement (2d) of Torts, Section 580B. These factors were accurately set forth in Instruction No. 3 to the jury.

The court recognizes that there is a split of authority on the issue of whether expert testimony has to be produced on the standard of care for journalists in libel cases. *See generally Annotation, Libel and Slander: Necessity of Expert Testimony to Establish Negligence of Media Defendant in Defamation Action by Private Individual*, 37 ALR 4th 987 (1985). However, in this case the court concludes that expert testimony was not required to assist the jury in determining whether the defendant was negligent in stating that the machine "did not work" as opposed to stating that the machine did not work in the intended or financially viable manner. The court concludes that this is a matter within the common understanding of lay persons.[2]

The most difficult question presented in the Renewed Motion for Judgment as a Matter of Law concerns the defense of substantial truth. Again, the court is convinced that the jury was accurately instructed on this defense. *See* Instruction No. 5. However, the court concludes that although the question is close, this is a case in which it can be determined as a matter of law that the report was substantially true.

---

[2] The defendant produced the conclusory opinions of Elissa Weldon to the effect that the standards of journalistic competence were met in this case. However, there was nothing about Ms. Weldon's testimony in this regard that was helpful in determining what the standards were or why her expertise assisted the jury in making that determination.

This subject was addressed at length in this court's order of April 13, 1994, beginning at page 9. A brief recap of the news story and the evidence is important. The story announced at the outset that the garbage recycling machine did not work. At that point in the story, the term "work" was not defined and, without more, one might be left with the conclusion that the machine did not physically operate. Later in the story, Rebecca Chase explains that the Berrien County machine was supposed to work like a Lundell machine that was shown in operation in Tennessee, sorting the trash and paying for itself by selling the recycled materials and charging user fees. It is followed by a clip from Berrien County Commissioner Joe Stallings in which he states, "There's nothing physically wrong with the machine. It's the people."

In this court's order of April 13, 1994, the court found it was "at least arguabl[e]" that the report stated that the machine itself did not work. *Id.*, at 13. The court further stated that Mr. Stallings' statement could at least arguably be interpreted by a jury as an excuse or an attempt to shift the blame for purchasing a machine that did not function properly. *Id.* The court also noted that it is not until almost one-third of the way through the report that there is an implication that the machine functioned adequately, but did not work in the sense of being financially viable.

The court now concludes that its concern about the delay in defining what is meant by the phrase "did not work" is not a sufficient concern to take this matter out of the doctrine of substantial truth. When a trial court can find as a matter of law that a challenged publication is substantially true, it may properly grant judgment for the defendant. *Moldea v. New York Times Company*, 15 F.3d 1137, 1150 (D.C. Cir. 1994), modified on other grounds, 22 F.3d 310 (D.C. Cir. 1994).

Generally, the law in this area was accurately set forth in this court's order of April 13, 1994 and need not be set forth here again. However, it bears repeating that:

> The rule of substantial truth is based on a recognition that falsehoods which do no *incremental* damage to the

> plaintiff's reputation do not injure the only interest that the law of defamation protects. A news report that contains a false statement is actionable "only when 'significantly greater opprobrium' results from the report containing the falsehood than would result from the report without the falsehood." *Herron v. King Broadcasting Co., supra*, 776 P.2d at 102. Even when the plaintiff in a defamation suit is not a public figure, the Supreme Court insists in the name of the First Amendment that unless the author is deliberately lying or is recklessly indifferent to the truth or falsity of what he says (neither is a plausible hypothesis here), the plaintiff must prove actual though not necessarily pecuniary harm in order to recover damages. *Gertz v. Robert Welch, Inc.*, 418 US 323, 349-50, 94 S.Ct. 2997, 3011-12, 41 L.Ed. 2d 789 (1974). Falsehoods that do not harm the plaintiff's reputation more than a full recital of the true facts about him would do are thus not actionable. The rule making substantial truth a complete defense and the constitutional limitations on defamation suits coincide.

*Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222 (7th Cir. 1993) at 1228. *See also Jones v. Palmer Communications*, 440 NW 2d 884 (Iowa 1989).

The importance of placing the allegedly defamatory statements in the context of the work as a whole has been stressed on occasions too numerous to cite. *See generally Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087 (4th Cir. 1993) ("A magnifying glass is no aid to appreciating a Seurat, and the pattern of a complex structure is often discernible only at some distance.") *Id.*, at 1098.

After elucidation of the context throughout the jury trial, this court now concludes that *Norse v. Henry Holt and Company*, 991 F.2d 563 (9th Cir. 1993) is helpful authority on the issue of substantial truth. In that case the plaintiff contended that the following sentence contained about him in a book was libelous: "Harold thought of himself as 'dark-horse Norse,' ignored and unpublished." The Ninth Circuit Court of

Appeals held that, in context, the word "unpublished" does not mean literally that Norse had not been published. Rather, it reflected Norse's own perception of himself as an artist who was unfairly neglected and ignored. In a footnote, the Court set forth its impression of the work as a whole indicating that it was generally complimentary of poet Harold Norse.

In context, the ABC story stated that Lundell's machine in Berrien County, Georgia was supposed to work like the Lundell machine in Tennessee which paid for itself by selling recycled fuel pellets and charging user fees. The story noted that Lundell made recyclable fuel pellets but cast blame by implication on local authorities for their failure to find a buyer for the pellets.[3] The court distinguished *Norse* in its April 13, 1994 order. Frankly, that distinction now escapes the court and the court concludes that this authority solidly favors the defendant.[4]

---

[3] Ironically, the statement about a failure to find a buyer for the pellets was inaccurate as a local Archer-Daniels-Midland plant had purchased pellets and there was evidence that a member of the ABC crew knew this. The court granted judgment as a matter of law to the defendant on this point at the close of the plaintiff's case because the statement was not "of and concerning" the plaintiff. However, in the context of the statement about the machine not working, this inaccuracy favors the plaintiff in that it shows that the machine made the pellets, but there simply was not a market for them in Georgia.

[4] The court's conclusions concerning the doctrine of substantial truth render moot plaintiff's motion for prejudgment interest and the defendant's other arguments concerning the plaintiff's proof of damages. For the sake of completeness, the court notes that it would have struck plaintiff's damages in the amount of $158,000 for lost profits in any event. The defendant contends that these damages were too speculative to be submissible. The plaintiff contends that it produced a reasonable basis from which uncertain damages could be approximated.

Iowa law is clear that there is a distinction between proof of the fact that damages have been sustained and proof of the amount of damages. If it is speculative and uncertain whether damages have been sustained, recovery is denied. If the uncertainty lies only in the amount of damages, recovery may be had if there is proof of a reasonable basis from which the amount can be inferred or approximated. *Kanzmeier v. McCoppin*,

Pursuant to FRCP 50(c), if the renewed motion for judgment as a matter of law is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. In determining whether a verdict is against the weight of the evidence, the trial court can rely on its own reading of the evidence—it can weigh the evidence, disbelieve witnesses, and grant a new trial even where there is substantial evidence to sustain the verdict. *White v. Pence*, 961 F.2d 776, 780 (8th Cir. 1992).

The defendant requests a new trial contending that the evidence is insufficient to support the jury's finding in favor of the plaintiff. This is really an argument in favor of judgment as a matter of law, rather than a request for a new trial. Similarly, other reasons urged in support of ABC's request for a new trial such as error in instructing on damage to reputation,

---

398 NW 2d 826, 833 (Iowa 1987). *See also Hayes v. Hettinga*, 228 NW 2d 181, 186 (Iowa, 1975). Under Iowa Law, the jury need not make the computation of damages with mathematical exactness. It is enough if there is proof of a rational basis for computation. *Lakota Girl Scout Council v. Harvey Fundraising Management, Inc.*, 519 F.2d 634 (8th Cir. 1975); *Hoover v. Valley West Des Moines*, 823 F.2d 227 (8th Cir. 1987).

The court is convinced that this story did damage to Lundell Manufacturing. There was tremendous interest in the plaintiff's recycling products up until the time that the story aired. Lundell was selling a relatively small number of these machines, but it was relatively consistent for several years before the July 2, 1992 story. The problem as far as the plaintiff's proof at trial was two-fold. First, the machines that Lundell sold had tremendous problems and the defendant did a very credible job of showing that most of these machines that were sold had to be taken back by Lundell through litigation or otherwise. Second, plaintiff's own evidence concerning lost sales was very inconsistent. On one day at trial, Vernon Lundell testified that but for the ABC story the plaintiff would have sold over twenty garbage recycling systems in the two years following the story. (Tr. 81). The next day, Vernon Lundell's son-in-law and vice-president of the plaintiff testified that the company would have sold three to four systems in the two years following the story. (Tr. 522). Because of these problems, the court is left with the conclusion that there has not been proof of a reasonable basis from which the amount of Lundell's lost profits could be inferred or approximated.

on the burden of proof, in the admission of evidence, and the form of the verdict, are not appeals to the discretion of the court to prevent a miscarriage of justice but are rather invitations to change legal rulings in the context of another trial. Except to the extent noted above, these requests are denied.

The only request for a new trial that asks the court to reweigh the evidence is the defendant's argument that the verdict of the jury was so excessive as to shock the conscience. The request for a new trial on this ground is denied. A verdict in the amount of $900,000 for damage to reputation is not excessive when one considers the size and age of this company and the evidence concerning the impact that ABC's story had on plaintiff's business. A verdict in the amount of $900,000 does not seem excessive when one considers the investment alone that Lundell made in retooling its plant to manufacture these garbage recycling machines. The plaintiff presented evidence from which the jury could reasonably find that the plaintiff's reputation in the industry was damaged to the extent that the investment that plaintiff had made is now worthless. Under these circumstances, the request for new trial is denied.

Upon the foregoing

IT IS ORDERED that

1. Plaintiff's Motion to Alter or Amend the Judgment, Docket #104, is denied as moot.

2. Defendant's Motion for Judgment as a Matter of Law, Docket #106, is granted. Its Motion for a New Trial is denied as moot.

3. Defendant's Motion to Exceed Page Limitation, Docket #109, is granted.

September 28, 1995.

/s/ JOHN A. JARVEY
John A. Jarvey
Chief Magistrate Judge
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

No. C92-4060
Filed: September 28, 1995

---

LUNDELL MANUFACTURING COMPANY, INC.,

—v.—

CAPITAL CITIES/ABC, INC.
and AMERICAN BROADCASTING COMPANIES, INC.,

---

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☑ Decision by Court. This action came to trKaKK ðt hearing before the Court. The issues have been trKeKdK ðr heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT plaintiff, Lundell Manufacturing Company, Inc., take nothing from defendants, Capital Cities/ABC, Inc. and American Broadcasting Companies, Inc.

September 28, 1995
*Date*

/s/ WILLIAM J KANAK
*Clerk*
/s/ ILLEGIBLE
*(By) Deputy Clerk*

## EXCERPTS FROM BENCH DECISION ON MOTION FOR A DIRECTED VERDICT

[770] THE COURT: Thanks. Your clients weren't told to be here, but are they going to be here before 9 or just 9 o'clock?

MR. LUNDBERG: I don't know, Your Honor.

THE COURT: I'm about to take away part of their case; and so I don't like to do that when they're not here, but I didn't ask them to be here.

MR. LUNDBERG: Let me see if they're here.

I don't see them, Your Honor. As far as I'm concerned we can go ahead.

THE COURT: Yeah, that's fine. I mean, I want people to understand that when they [771] lose certain things that it was the product of deliberation and that the matters were fully and freely discussed and that the law was considered and that sort of thing.

The motion for a directed verdict is granted with respect to the "no one found a buyer" statement. It's also granted with respect to actual malice on the it "did not work" statement. It's denied or ruling is reserved in all over respects.

With respect to the statement that the machine turned garbage into compost and pellets but no one found a buyer, in order for that statement to be of and concerning the plaintiff there has to be some implication that it's the fault of the machine or Lundell Manufacturing.

When it is said that no one found a buyer it has to mean that there was no market for this stuff, the pellets, or that there is—there is a market but that the Berrien County officials didn't know or were unable or couldn't, didn't how to sell it.

The question is whether that statement implies that there was—that it's the machine itself or that the pellets were of poor [772] quality; but from the words that were used in the broadcast and the reasonable inferences therefrom, the fact

that they can't sell them or that no one found a buyer is not a criticism of the quality of the pellets and the machine.

The story did not really, I don't think, come close to criticizing the quality of the pellets. What it was at that point was critical of Joe Stallings for his—perhaps his failure to investigate a market or whatever, but it's—it was the concern about his promises that he made in terms of the—what the machine would do.

Of course, this is not a question of involving what the Court believes but rather a question of what a reasonable juror could find from the evidence that has been presented, taking that evidence in a light most favorable to the plaintiff.

And as we know from all of our research, I think we all agree that for something to be of and concerning the plaintiff there must be an inference—by inference or otherwise it must refer to the plaintiff in some intelligent way.

[773] That, of course, is not a standard that's easily or mathematically applied. But here it must—it must refer to them in some way as to suggest that there was a—an obligation, a duty or some other form of responsibility on the part of Lundell Manufacturing for the failure to find a buyer for these pellets.

There is, of course, no direct reference; but that's not necessary. Under the law, you know, an inference is permissible. Of course, the direct reference here is to—I'm not sure if it's Joe Stallings or the county commissioners. It seems to me like Joe Stallings is the primary one who's taking the brunt of the blow here; but whether it's him or the commissioners, it doesn't matter.

It's just simply without more I don't believe that a jury could find that this particular statement about the failure to find a buyer is a statement of and concerning Lundell. For that reason, the motion for a directed verdict is granted with respect to that particular claim.

Going on to the question of actual [774] malice, we know from *Anderson v. Liberty Lobby* that where there's a factual dispute concerning actual malice, the appropriate directed

verdict standard will be whether there is evidence in the record that could support a reasonable jury's finding of actual malice by clear and convincing evidence or with convincing clarity. Courts must take into consideration the burden of proof there, and the difference in that burden of proof from the ordinary preponderance standard in determining whether a reasonable jury could so find.

Actual malice as applied to a media defendant does not refer to its ill will. The primary focus has to be on the defendant's attitude toward the truth of the statements rather than the defendant's attitude towards the plaintiff.

And as we know from *New York Times v. Sullivan* that a statement that is made with actual malice—or a statement is made with actual malice if it is made with knowledge that it is false or with reckless disregard of whether it is false or not.

A failure to exercise ordinary or [775] reasonable care in ascertaining the truth of the published material does not standing alone render a publisher liable for punitive damages with the actual malice standard for defamation of a private figure.

In order to establish recklessness the plaintiff must prove that the defendant had a high degree of awareness of the probable falsity of the statements published. The standard is based on the defendant's actual state of mind, and the recklessness of the conduct is not measured by whether a reasonably prudent person would have published the material or would have investigated before publishing it.

We do know that the failure to investigate will sustain a claim of actual malice where there is information in the publisher's hands that obviously contradicts the information that they have.

In this case the—with respect to the statement it "does not work," the showing of the machine in operation, the interview on the broadcast with Joe Stallings, the demonstration of the machine in Tennessee, and other facts in the record show that there could not have been a [776] high degree of awareness of the probable falsity of statements published concerning

whether the machine worked. And for that reason, the motion for a directed verdict is also granted with the—with respect to the claim of actual malice.

The defendant thinks that the directed verdict on the actual malice standard means that the case is over, but the Court disagrees. Lundell is a private-figure plaintiff, and I've not seen anything to change my opinion on that in the evidence here this week.

Lundell has not thrust itself into public controversy. In fact, the evidence is that they—what evidence there is on that subject is that it attempted to avoid that, the public controversy that arose in Berrien, Georgia.

The mere fact that Lundell Manufacturing sold to a government entity is not sufficient evidence to establish that it is a public figure. It is true that Lundell sells to entities in a highly regulated industry; but it itself, Lundell, has not been shown to be the subject of regulations other than, you know, [777] what one would assure all manufacturers are—how they're regulated.

The regulations that we were talking about have to do not with the manufacture or the selling of these machines but rather in the manner in which the material that's sent through their machine is handled. And that does not place Lundell Manufacturing in such a position of a regulated industry such that the—it makes them a public—or a public-figure defendant—plaintiff, I'm sorry.

There are cases that ABC had cited that says the corporation never has a private life. It think those are the minority of authority, and I think the case law to the contrary, specifically there are cases cited in the plaintiff's brief from the First Circuit and perhaps other places, that demonstrate that a corporation is entitled under appropriate circumstances to be treated as a private plaintiff.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

No. C 92-4060
Filed: April 13, 1994

---

LUNDELL MANUFACTURING COMPANY, INC.,

*Plaintiff*,

—VS.—

CAPITAL CITIES/ABC, INC.,

*Defendant*.

---

ORDER

This matter comes before the court pursuant to defendants' February 7, 1994, motion for summary judgment (docket number 41). Plaintiff resisted the motion on March 8, 1994. The motion is granted in part and denied in part.

UNDISPUTED FACTS

On July 2, 1992, the defendants, Capital Cities/ABC, Inc., and American Broadcasting Companies, Inc. (collectively "ABC"), as part of the ABC nightly news program, "World News Tonight with Peter Jennings," broadcast a story by employee Rebecca Chase concerning a solid waste recycling system in Berrien County, Georgia (the County), manufactured by plaintiff Lundell Manufacturing Co., Inc. (Lundell). Lundell alleges that three statements made in that report are false and libelous.

In March of 1987, Berrien County Commissioner Joe Stallings (Stallings) travelled to Lundell's plant in Cherokee, Iowa, as part of his investigation of ways to resolve the County's solid waste disposal problems. Following Stallings's report to the County Commission, the Commission voted to purchase a garbage recycling machine from Lundell (the Lundell machine) for which they were eventually billed $1,012,877.74. The Lundell machine sends garbage through a series of sorting stations on conveyer belts. Recyclable materials are removed, then the remaining trash is made into compost or into fuel pellets of compressed trash.

The County set up a separate entity, the Berrien County Resource Recovery Development Authority (the Authority), and entered into an intergovernmental contract with it under which the Authority was to operate the Lundell machine and to provide garbage and waste disposal services for the County. The Authority financed purchase of the Lundell machine and set-up costs for the waste disposal project by issuing $2 million in revenue bonds. The issuance of these bonds did not require voter approval.

The Authority was intended to be financially self-sufficient. Revenue for operations and to retire the bonds was to come from "tipping fees" and sale of recyclable materials produced by the Lundell machine, including the compost and fuel pellets. However, the County agreed to pay any deficit between revenues generated by the Authority and the amount required for its operations and to pay the principal and interest on the revenue bonds. While the Authority was operating the Lundell machine, the County was required to supplement the revenues collected by the Authority.

In 1990, the Authority attempted to increase the tipping fees to help finance its operations. That attempt resulted in litigation between the Authority and municipalities in the County. Residents of the County filed a class action suit in October of 1991 for declaratory judgment and injunctive relief to prevent the County from making further supplemental payments to the Authority and to invalidate the County's obligation to cover the bonds.

The Authority was not able to sell all of the recyclable items produced by the Lundell machine. Compost and fuel pellets were stored outside on the property where the Lundell machine was housed. In May of 1992, the Georgia Department of Natural Resources revoked the permit authorizing the Authority to operate the Lundell machine. The County now has garbage hauled to a landfill in another county.

The problems and litigation involving the County's waste disposal project led first to a report in the Atlanta *Journal-Constitution* on June 21, 1992, then to the ABC World News Tonight report in question here on July 2, 1992. ABC News personnel conducted an investigation prior to airing the July 2, 1992, report. They reviewed documents from the litigation involving the Authority, county commission documents, audit information, and documents from the Georgia Department of Natural Resources. They also interviewed present and former County officials, County residents, Lundell personnel, including company president, Vernon Lundell, but did not interview the Authority's plant manager, David Gaskins.

Lundell filed a libel complaint against ABC on August 10, 1992, and an amended complaint on August 11, 1992. The complaint and amended complaint allege that three statements in the broadcast of July 2, 1992, were false and libelous. The first statement is that taxpayers in Berrien County, Georgia, "are angry that they are stuck with a 3 million dollar debt for this garbage recycling machine that they never approved and does not work." The second statement is, "The machine turned the garbage into fuel pellets and compost, but no one found a buyer." The third statement is, "The final insult: taxpayers are now forced to have their trash hauled to another county's landfill 50 miles away and pay yet again to get rid of their garbage."[1] Although Lundell is never named, its logo appears in pictures of the recycling machine.

---

[1] The full text of the broadcast is provided in Exhibit 2 of ABC's motion for judgment on the pleadings (docket no. 22). A videotape of the full broadcast is provided in Exhibit 1 of the same motion.

ABC answered Lundell's complaint on October 9, 1992. ABC has now moved for summary judgment on the ground that as a matter of law Lundell cannot prove either liability or damages as the result of its July 2, 1992, report. Specifically, ABC argues that Lundell cannot demonstrate that the challenged statements were false. ABC next argues that the statements are not actionable because they were substantially true. ABC also argues that Lundell cannot demonstrate that ABC was negligent, such that ABC could be liable for actual damages, and further, that Lundell cannot demonstrate the requisite evidence of actual damages. Finally, ABC argues that Lundell cannot show ABC acted with "actual malice," such that ABC can be held liable for presumed or punitive damages.

## CONCLUSIONS OF LAW

### A. Standards For Summary Judgment

On a motion for summary judgment, the court considers the entire record. Federal Rule of Civil Procedure 56 governing summary judgment states, in pertinent part:

> Rule 56. Summary Judgment
>
> (b) For Defending Party. A party against whom a claim . . . is asserted . . . may, at any time, move for summary judgment in the party's favor as to all or any part thereof.
>
> (c) Motion and Proceedings Thereon. . . . *The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.*

*Fed. R. Civ. P.* 56(b) & (c) (emphasis added); *See also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Burk v. Beene*, 948 F.2d 489, 492 (8th Cir. 1991); *Moore v. Webster*, 932 F.2d 1229, 1231-32 (8th Cir. 1991).

"Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The moving party bears the burden of showing that no genuine issue of fact exists. *Reed v. Woodruff County, Ark.*, 7 F.3d 808, 810 (8th Cir. 1993). Once the movant has met that burden, the non-moving party must designate specific facts showing that a genuine dispute about a material fact remains for trial. *Id.* Although "direct proof is not required to create a jury question, . . . to avoid summary judgment, 'the facts and circumstances relied upon must attain the dignity of substantial evidence and must not be such as merely to create a suspicion.' " *Metge v. Baehler*, 762 F.2d 621, 625 (8th Cir. 1985), *cert. denied*, 474 U.S. 1057 (1986).

Libel in Iowa is the "malicious publication, expressed either in printing or in writing, or by signs and pictures, tending to injure the reputation of another person or to expose [the person] to public hatred, contempt, or ridicule or to injure [the person] in the maintenance of [the person's] business." *Vinson v. Linn-Mar Community School Dist.*, 360 N.W.2d 108, 115 (Iowa 1984). It is not necessary that the allegedly defamatory publication identify the plaintiff by name, only that it "by inference or innuendo at least refer in an intelligent way to the person libeled." *Boardman & Cartwright v. Gazette Co.*, 281 N.W. 118, 120 (Iowa 1938); *See also Brown v. First Nat'l Bank of Mason City*, 193 N.W.2d 547, 553 (Iowa 1972) (plaintiff not named in news item, but identity clear from circumstances). Whether a publication is understood as defamatory "must be determined by giving to the subject-matter thereof, as a whole, that meaning which naturally belongs to the language used." *Kiner v. Reliance Ins. Co.*, 463 N.W.2d 9, 14 (Iowa 1990). In *Jones v. Palmer Communications, Inc.*, 440 N.W.2d 884, 891 (Iowa 1989), the Iowa Supreme Court stated that

> [i]n considering the content of any television broadcast, it is important to see the actual broadcast. A written summary is insufficient to provide the full impact of the telecast.

It is for the court to determine whether the words are capable of a defamatory meaning, and for the jury to determine whether they were so understood. *Kiner*, at 14; *Brown*, at 553.

The United States Supreme Court has made it clear that a libel plaintiff must bear the burden of proving that the challenged statements were false. *In re IBP Confidential Bus. Documents Litigation: Bagley v. Iowa Beef Processors, Inc.*, 797 F.2d 632, 647 (8th Cir. 1986) (hereinafter *Bagley*) (citing *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1986)). In order to recover actual damages, the libel plaintiff who is a private figure[2] must establish the "fault" of the defendant in publishing those false statements. *Id.*; *see also Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1986); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Finally, in order to recover presumed or punitive damages, the libel plaintiff who is a private figure must in addition to proving falsity prove by clear and convincing evidence that the defendant's actions in publishing the challenged statements constituted "actual malice" as defined in *New York Times v. Sullivan*, 376 U.S. 254 (1964). *Id.* If the libel plaintiff is a public figure, and the allegedly libelous statements involve a matter of public concern, the plaintiff must prove "actual malice" on the part of the defendant to establish liability and to recover any damages. *Gertz*, *supra*, at 335-36; *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 162 (1967); *New York Times*, *supra*, at 279-80. It follows from the cases cited above

---

[2] The parties dispute whether Lundell is a private or public figure and whether the issue involved in the July 2, 1992, report was a matter of private or public concern. Neither party has moved for summary judgment on these issues and it is not necessary for the court to decide them here. In the context of the present motion, the court need only determine whether Lundell can meet any standard of proof necessary for liability and damages.

that ABC will be entitled to summary judgment only if it can establish that there is no genuine issue of material fact as to falsity, substantial truth, fault, actual damages, or actual malice and that ABC is entitled to judgment as a matter of law on each of these issues.

### B. Falsity And Substantial Truth

Lundell must first establish that the challenged statements in the July 2, 1992, report are false. *Bagley*, *supra*, at 647. True statements, no matter how damaging to the plaintiff, may never provide the foundation for a libel claim. *Garrison v. Louisiana*, 379 U.S. 64 (1964); *New York Times*, *supra*. In *Bagley*, the Eighth Circuit Court of Appeals reversed judgment in favor of a libel plaintiff because the plaintiff had not been required to prove the falsity of the challenged statements. *Id.*

A libel plaintiff may not succeed by combining the damaging nature of certain true statements with the falsity of other, immaterial statements in order to provide the basis for a libel claim. *AIDS Counseling & Testing Centers v. Group W TV*, 903 F.2d 1000, 1004 (4th Cir. 1990). Summary judgment in favor of the defendant is proper where the statements shown to be false are immaterial. *Id.* However, the "truth" of the challenged statement "must be as broad as the defamatory imputation or 'sting' of the statement." *Schiavone Constr. Co. v. Time, Inc.*, 847 F.2d 1069, 1084 (3d Cir. 1988).

> The falsity of a statement and the defamatory "sting" of the publication must coincide—that is, where the alleged defamatory "sting" arises from substantially true facts, the plaintiff may not rely on minor or irrelevant inaccuracies to state a claim for libel.

*Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1092 (4th Cir. 1993); *see also AIDS Counseling & Testing Centers*, *supra*, at 1004 ("if the gist or 'sting' of a statement is substantially true, 'minor inaccuracies will not give rise to a defamation

claim' "). Statements must not be judged in isolation, but within the context in which they are made. *Norse v. Henry Holt & Co.*, 991 F.2d 563, 567 (9th Cir. 1993).

Lundell asserts that each of the statements in question is false, or at the very least that there is a genuine issue of material fact as to falsity. First, Lundell asserts that the statement that the "machine . . . does not work" suggests that it was mechanically inoperative, but that the machine does work and always has worked as designed. ABC asserts that the statement that the "machine . . . does not work" meant, in context of the July 2, 1992, report, that the entire trash disposal plan, including tipping fees and sale of recyclable products, was not financially viable. ABC argues that there can be no genuine issue of material fact that the Berrien County waste disposal program was not financially viable.[3] ABC also argues that at best Lundell has suggested an "ambiguity" and such an ambiguity cannot meet the constitutional standards for a libel action. ABC cites *Hepps, supra*, at 776, and *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1057 (9th Cir. 1990), *cert. denied*, 499 U.S. 961 (1991), for this last proposition.

The court is not perusaded by ABC's argument. Neither *Hepps* nor *Rooney* held that an ambiguous statement cannot be the basis for a libel action. Rather, both held that where *evidence* of the truth or falsity of a statement was inferential or ambiguous, the constitutional standards had not been met. *See Hepps, supra* at 776; *Rooney, supra,* at 1057. In *Rooney*, the ambiguous evidence was on the question of whether or not Andy Rooney had actually used the product he said "did not work" in a broadcast. *Id.* The parties did not suggest contradictory or ambiguous meanings to the phrase, "did not work." *Id.* What is ambiguous in the present case is the meaning of the statements, not the evidence as to their truth.

---

[3] ABC argues that Vernon Lundell, in deposition testimony, conceded that the County's waste disposal system was not financially viable. Whether he did or not, Vernon Lundell's statement is not a concession that the challenged statement, that the machine "does not work," means what ABC says it does.

Similarly, ABC argues that the Ninth Circuit Court of Appeals held in *Norse, supra*, at 567, that where a libel plaintiff concedes the underlying accuracy of the challenged statement, but attributes a different meaning to it, the plaintiff has not demonstrated falisty. Rather, the holding in *Norse* was that "because [the plaintiff] does not dispute the accuracy of the [challenged statement], but rather ascribes to the statement a meaning *it does not carry*," summary judgment in favor of the defendant should be granted. *Norse, supra*, at 567-68 (emphasis added). The phrase "does not work" in the context of the report presently being challenged could reasonably carry the meaning Lundell has offered.

Furthermore, because determination of the gist or "sting" of a challenged statement is necessary to resolution of a libel claim, in determining whether a statement is true, the first question the court must ask is: what did the defendant say? *Schiavone Constr. Co., supra*, at 1084. In *Schiavone*, the Third Circuit Court of Appeals "perceive[d] a range of possible answers" to that question, including both the interpretation of the challenged statement offered by the plaintiff and the one offered by the defendant. *Id.* The court concluded that "a jury must resolve the question of the sting because reasonable persons could differ on that question." *Id.* ABC argues that no reasonable jury could give the challenged statements the meaning Lundell offers in the context in which the statements are offered. The court does not agree. The context of the first challenged statement is illustrative. Rebecca Chase's report begins by stating

> [i]n this south Georgia county of tobacco farms and pecan groves, taxpayers are angry that they are stuck with a 3 million dollar debt *for this garbage recycling machine that they never approved and does not work.*

The report at least arguably states that it is the machine itself that does not work.[4] It is not until almost one-third of the way

[4] The statement is also inaccurate to the extent that it could be interpreted as stating the cost of the Lundell machine to be $3 million. The record demonstrates that the cost of the Lundell machine was

through the report that any implication arises that the machine is functioning adequately, but that other factors are involved.[5] The court concludes that there is a genuine issue of material fact for the jury to decide as to what is meant by the statement that the machine "does not work," and as a consequence, whether that statement is either false or substantially true.

The court concludes that there is also a genuine issue of material fact as to the falsity or substantial truth of the second of the challenged statements. The record shows that there is a dispute as to whether or not fuel pellets made by the Lundell machine were sold,[6] which precludes summary judgment on the falsity or substantial truth of the statement that "no one found a buyer" for those pellets.

As to the third challenged statement, Lundell appears to challenge the *implication* that trash must be hauled to another

---

$1,012,877.74. The total cost of the project, including set-up of the waste disposal project, the Lundell machine, operation of the Authority, and interest on the revenue bonds issued by the Authority is approximately $3 million.

[5] Rebecca Chase explains at that point, while showing another Lundell machine in Tennessee, that the Berrien County machine was supposed to "work" by both sorting the trash *and* "paying for itself by selling the recycled materials and charging user fees." It is still not clear at this point in the report whether the Berrien County machine failed the first or second criterion. The next statement is by Commissioner Joe Stallings. Stallings says, "There's nothing physically wrong with the machine. It's the people." ABC places great weight on Stallings's statement as showing that the "sting" of the report was not whether the machine was operable, but whether it was financially viable. Stallings's statement could at least arguably be interpreted by a jury as an excuse or shifting of the blame for buying a machine that did not function properly.

[6] Lundell argues that the record shows that Archer Daniels Midland did purchase a substantial amount of fuel pellets over some time. ABC argues that its statement in the report that "no one found a buyer" is merely inaccurate, not false, if there was only one buyer of fuel pellets during the time the Lundell system was working in Berrien County. ABC points to the undisputed fact that there were unsold fuel pellets stored on the Authority's property. The court concludes that if a jury finds that there was even one buyer of fuel pellets, the categorical statement that "no one found a buyer" would be false, not merely inaccurate.

county because the Lundell *machine* does not work. ABC asserts that the last challenged statement must be considered in the context of financial viability of the entire trash recycling program. It is undisputed that the County at the time of the report had trash hauled to another county. Where a plaintiff challenges a statement on the falsity of the implications, rather than the facts literally related by the statement, the

> defamatory implication must be present in the plain and natural meaning of the words used. *Carwile v. Richmond Newspapers, Inc.*, 196 Va. 1, 82 S.E.2d 588, 591-92 (1954). Moreover, because the constitution provides a sanctuary for truth, a libel-by-implication plaintiff must make an especially rigorous showing where the expressed facts are literally true. The language must not only be reasonably read to impart the false innuendo, but it must also affirmatively suggest that the author intends or endorses the inference. *White v. Fraternal Order of Police*, 909 F.2d 512, 520 (D.C. Cir. 1990).

*Chapin, supra*, at 1092. The court concludes that, although the third challenged statement might "be reasonably read to impart the false innuendo," Lundell cannot as a matter of law meet the requirement that the statement "also affirmatively suggest that the author intends or endorses the inference." The third challenged statement affirmatively suggests that as a result of the entire chain of events, trash must now be hauled to another county. Both of the other challenged statements refer directly to the Lundell machine, its cost, function, or products it produces, and therefore "by inference or innuendo at least refer in an intelligent way to" Lundell. *Boardman & Cartwright v. Gazette Co.*, 281 N.W. 118, 120 (Iowa 1938). The third challenged statement does not. ABC's motion for summary judgment must be granted to the extent that any of Lundell's claims for relief are based on the third challenged statement.

The court concludes that there is a genuine issue of material fact as to the falsity or substantial truth of the first two

challenged statements. ABC's motion for summary judgment on the falsity or substantial truth of these statements must be denied. ABC's motion for summary judgment must be granted as to the third challenged statement.

## C. Liability For Damages

In addition to proving the falsity of the challenged statements, the libel plaintiff must meet the standards of recovery applicable to the plaintiff's status as either a public or private figure. *Bagley, supra*, at 643. If the libel plaintiff is a public figure, and the allegedly libelous statements involve a matter of public concern, the plaintiff must prove "actual malice," as defined in *New York Times*, on the part of the defendant to recover any damages. *Gertz, supra*, at 335-36; *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 162 (1967); *New York Times, supra*, at 279-80. The private figure plaintiff must prove *New York Times* "actual malice" by clear and convincing evidence in order to recover presumed or punitive damages, *Bagley, supra*, at 647, but to recover actual damages, the private figure plaintiff must only establish the "fault" of the defendant in publishing false statements. *Id.; see also Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1986); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Because the standards of recovery for presumed or punitive damages applicable to a private figure encompass the more stringent standards for recovery of any damages by a public figure, the court's analysis here is made in terms of a private figure plaintiff.

### 1. Proof Of Fault

The United States Supreme Court concluded that states should be given significant leeway in providing legal remedies to defamed private individuals both because they were more deserving of recovery and because they were more vulnerable to injury. *Bagley, supra*, at 643.

> With this in mind, the Court left the states largely free to develop standards of recovery applicable to private figures, limited only by the requirement that the states not impose liability without fault. [*Gertz, supra,*] at 347, 94 S.Ct. at 3010.

*Id.* at 643-44. Iowa has adopted a negligence standard for private plaintiffs in a defamation or libel action. *Jones v. Palmer Communications, Inc.*, 440 N.W.2d 884, 898 (Iowa 1989).

> Even though we adopt a negligence standard, we are aware of the special protection traditionally provided to the media. We respect the essential role that the media play in preserving our democratic rights. The balance between the public interest in the free press and the protection of a private individual injured by defamation can be maintained by a standard of negligence which takes into account the unique role of the press. *Here, we apply the professional standard of care, which is that degree of care which ordinarily prudent persons in the same profession usually exercise under similar conditions. The private plaintiff must establish by a preponderance of the evidence that this standard of care has been breached.*

*Id.* (Citations omitted; emphasis added). If Lundell is a private figure, Lundell will therefore have to show by a preponderance of the evidence that ABC's employees breached the standard of care of reasonably prudent professional broadcast news employees in broadcasting the July 2, 1992, report.

The *Palmer Communications* court went on to identify several factors that the finder of fact should consider to determine if the above standard of care has been breached by a media defendant:

> 1. Whether the material was topical and required prompt publication, or whether sufficient time was available for a thorough investigation of its contents;
>
> 2. The newsworthiness of the material and public interest in promoting its publication;

3. The extent of damage to the plaintiff's reputation should the publication prove to be false;

4. The reliability and trustworthiness of the source.

*Id.* (citing *Restatement (Second) of Torts*, § 580B, comments g and h). The thoroughness of the accuracy check a reasonable person would make before publishing a defamatory statement will vary, depending on the relative weight of these factors and the circumstances of the case. *Id.* Ordinarily, issues of negligence are not susceptible of summary adjudication but should be resolved by trial in the ordinary manner. *Id.*

ABC argues that Lundell cannot meet this standard. First, ABC argues that its employees checked facts, reviewed documents, and conducted interviews in an extensive investigation before broadcasting the July 2, 1992, report. Second, ABC argues that Lundell has not designated an expert witness from whom testimony could be elicited on the professional standard of care and its breach in this case.

Lundell argues that ABC was negligent because its employees never consulted David Gaskins, the Authority's recycling plant manager, about such facts as whether or not the machine functioned properly or if there was a buyer for the fuel pellets it produced. Members of an ABC camera crew did talk to Gaskin while shooting videotape of the Lundell machine for the story. Lundell asserts that some of the people ABC did interview referred ABC to Gaskins if ABC was to get an accurate picture of the recycling project. Lundell asserts that had ABC consulted with Gaskins, he would have told them that the machine functioned properly and that a buyer had been found for every fuel pellet produced over the last nine months before the story was broadcast. Lundell also asserts that Gaskins was one of the most knowledgeable sources concerning operations of the Lundell machine and the County's recycling program, and therefore any reasonable professional would have contacted him prior to airing the report. Lundell also argues that because Gaskin actually told ABC personnel

on the camera crew that the machine was operational, demonstrated the truth of that statement by running the machine, and told them that all of the fuel pellets made in the last nine months had been sold to ADM, ABC had information in its possession before airing the story that tended to cast doubt on the truthfulness of its story. Lundell also argues that expert testimony is not necessary on the standard of care where breach of that standard can be recognized by lay persons.

The court agrees that under Iowa law, it is not necessary to present expert testimony to prove breach of a professional standard of care if negligence can be recognized with the common experience and knowledge of lay persons. *See, e.g.*, *Welte v. Bello*, 482 N.W.2d 437, 441 (Iowa 1992) (no expert testimony required for jury to decide whether doctor breached professional standard of care by injecting incorrect medication resulting in chemical burns); *Oswald v. LeGrand*, 453 N.W.2d 634, 639-40 (Iowa 1990) (no expert required in medical malpractice case for poor patient relations); *Devine v. Wilson*, 373 N.W.2d 155, 157 (Iowa App. 1985) (no expert required in suit against attorney for breach of duty of professional care). The court concludes that whether or not ABC met the standards of professional care articulated above in this case is within the capabilities of a jury to determine. There is also a genuine issue of material fact as to whether ABC conducted an adequate investigation when it failed to interview the manager of the plant that was at the center of the controversy it was reporting on and ignored the information the plant manger provided to the ABC camera. Whether or not Lundell can make the requisite showing of fault in this matter is therefore for the jury to decide.

2. Actual Damages

ABC argues that even if Lundell could prove fault, Lundell could not prove any actual damages. ABC argues that Lundell's "actual damages" are limited to special damages or actual pecuniary loss. ABC argues that Lundell has cited only two "prospective sales" that were lost as a result of the July

2, 1992, report. ABC asserts that neither of these prospective customers was ever conducting more than preliminary negotiations with Lundell and that both ultimately decided not to buy recycling equipment from any manufacturer. Thus, ABC argues, no sale would have occurred whether or not the report had been broadcast.

Lundell argues that there is no such limitation of actual damages to special damages or actual pecuniary loss. Rather, Lundell argues, actual damages include damage to reputation and standing in the community, humiliation, mental anguish and suffering. Lundell asserts that there is a genuine issue of material fact as to such damages in this case and as to damages for lost sales.

The court concludes that *Gertz* does stand for the proposition that actual damages in a libel case are not limited as ABC argues. *Gertz*, *supra*, at 350. The Court in *Gertz* stated,

> We need not define "actual injury," as trial courts have wide experience in framing appropriate jury instructions in tort actions. Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury.

*Id.* Lundell has put forward the affidavits of Vernon Lundell and Nat Mundy as evidence of reputational damage to Lundell as the result of the ABC report and as evidence that specific sales were lost as the result of the report. The court concludes that there is a genuine issue of material fact as to Lundell's actual damages precluding summary judgment on that issue.[7]

---

[7] The court is concerned with the adequacy and admissibility of Lundell's evidence of lost profits and lost investment. Such evidence must be more than speculative to create a jury question. Nonetheless,

3. Actual Malice

Finally, ABC argues that Lundell cannot make the requisite showing of "actual malice" to be entitled to presumed or punitive damages, if Lundell is a private figure, or to any damages, if Lundell is a public figure. ABC argues that its extensive pre-broadcast investigation precludes a finding of actual malice. Furthermore, ABC argues, none of its employees entertained serious doubt concerning the truth of the broadcast. Lundell argues that ABC's investigation was flawed because ABC did not heed contrary information or pursue sources suggested by others that would have cast considerable doubt on the truth of its broadcast.

"Malice" under *New York Times* does not refer to ill will. *Price v. Viking Penguin, Inc.*, 881 F.2d 1426, 1433 (8th Cir. 1989). The primary focus must be on the defendant's attitude toward the truth of the statements, rather than on the defendant's attitude toward the plaintiff. *Id.* A statement is made with "actual malice" if it is made "with knowledge that it was false or with reckless disregard of whether it was false or not." *Bagley*, *supra*, at 643 (citing *New York Times*, *supra*, at 279-80). The actual malice standard must be established by clear and convincing evidence. *Id.*

The lack of *New York Times* actual malice is proper ground for summary judgment and the judge must "view the evidence presented through the prism of the substantive evidentiary burden." *Anderson v. Liberty Lobby*, 477 U.S. 242, 254 (1986). Nonetheless, "the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255. The inquiry for the trial judge on a motion for summary judgment is

> whether the evidence presented is such that a jury applying the evidentiary standard could reasonably find for either the plaintiff or the defendant. Thus, where the factual dispute

---

Lundell has not yet been put to the proof on these issues. The question here is whether Lundell can prove actual damages as identified in *Gertz*. The court concludes that there is at least as genuine issue of material fact on actual damages.

> concerns actual malice, clearly a material issue in a *New York Times* case, the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not.

*Id.* at 255-56.

Malice in this context exists only if the defendant knowingly falsifies or "in fact entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1195 (9th Cir. 1989). The standard is based on the defendant's actual state of mind, and the recklessness of the conduct is not measured by whether a reasonably prudent person would have published the material or would have investigated before publishing it. *Price*, *supra*, at 1441 (citing *Secrist v. Harkin*, 874 F.2d 1244, 1252 (8th Cir. 1989), and *Speer v. Ottaway Newspapers, Inc.*, 828 F.2d 475, 478 (8th Cir. 1987), *cert. denied*, 485 U.S. 970 (1988)); *Schiavone*, *supra*, at 1089 (citing *St. Amant*, *supra*, at 731). Thus, "reckless disregard for the truth" means that defendant had a "subjective awareness of probable falsity." *Id.* (citing *Gertz*, *supra*, at 335 n.6). The focus is on the information within the defendant's possession. *Price*, *supra*, at 1433 (citing *St. Amant*, *supra*, at 733).

A plaintiff may "rarely be successful in proving awareness of falsehood from the mouth of the defendant himself." *Herbert v. Lando*, 441 U.S. 153, 170 (1979). A defendant subject to the actual malice standard "cannot . . . automatically insure a favorable verdict by testifying that he published with a belief that the statements were true." *St. Amant*, *supra*, at 732; *Schiavone*, *supra*, at 1090. Therefore, ABC's assertions that none of its employees had any doubts as to the truth of the story is to no avail. Objective circumstantial evidence can suffice to demonstrate actual malice. *Schiavone*, *supra*, at 1090; *Bose Corp. v. Consumers Union of United States*, 692 F.2d 189, 196 (1st Cir. 1982), *aff'd*, 466 U.S. 485 (1984)

("A court typically will infer actual malice from objective facts. . . . These facts should provide evidence of negligence, motive, and intent such that an accumulation of the evidence and appropriate inference supports the existence of actual malice.").

More specifically, mere evidence that a media defendant did not investigate properly does not rise to the level of actual malice. *Curtis Publishing Co.*, *supra*, at 154-54; *New York Times*, *supra*, at 287; *Schiavone*, at 1090. A failure to investigate may sustain liability if there was already good reason to doubt the truth of the information in hand. *Price*, *supra*, at 1433 (citing *St. Amant*, *supra*, at 733). Neither an erroneous interpretation of the facts nor the fact that the information presented turns out to be false allows an inference of actual malice. *Schiavone*, *supra*, at 1090 (citing *St. Amant*, *supra*, at 732, and *Time v. Pape*, 401 U.S. 279, 292 (1971)). However, the actual malice test could be met if the defendant had "obvious reasons to doubt the veracity of the informant or the accuracy of his reports." *St. Amant*, *supra*, at 732. For example, where the defendant finds internal inconsistencies or apparently reliable information that contradicts its libelous assertions, but nevertheless publishes those statements anyway, the *New York Times* actual malice test can be met. *Curtis Publishing Co.*, *supra*, at 161 n.23; *Schiavone*, *supra*, at 1090. Actual malice might also be found where there was evidence that the story was fabricated, it was inherently improbable, the sources were entirely anonymous and their reports unverified, or if there were particular reasons to doubt sources. *Price*, *supra*, at 1445.

The court concludes in this case that there is a genuine issue of material fact generating a jury question as to actual malice. A reasonable jury could conclude that ABC acted with actual malice in failing to interview the Authority's plant manager, the person with the most firsthand information concerning the operation of the Lundell machine, the sale of recyclable products produced by the machine, and general operation of the Authority's recycling program, and pre-

sumably the person with custody of relevant records of operation and sale of products from the Lundell machine. ABC failed to interview this person even after others ABC contacted referred ABC to him as the best source of accurate information on certain points at issue here. Failure to contact the plant manager is evidence of negligence, could have been motivated by a desire not to cloud the waters by discovering or presenting contradictory evidence, and could indicate an intent to publish the report without regard to its truth.

More importantly, ABC had information available to it prior to the broadcast that created internal inconsistencies or contradictions that, a jury could find, should have cast doubt on the truth of its story. According to the deposition of Gaskins, the plant manger, Gaskins told the ABC camera crew that the machine was operational in response to the statement of a member of the camera crew that they had heard that the machine was broken down. Deposition of David Gaskins, p. 7. Gaskins then demonstrated that the machine was operational by running garbage through it. *Id.* A member of camera crew also asked if the Authority had sold any of the fuel pellets. *Id.* at p. 8. Gaskins told him that all of the pellets made in the last nine months had been sold to ADM in Valdosta, Georgia.[8] *Id.* Rebecca Chase testified in deposition that she had been unable to confirm that any fuel pellets had been sold to ADM because ADM did not return several of her telephone calls, and, when they did, would not confirm anything, but referred her to the corporate public relations office in Decatur, Illinois. Deposition of Rebecca Chase Williams, p. 45.

Rebecca Chase also testified that other information in ABC's possession prior to the broadcast of the story indicated that there was a buyer for the fuel pellets produced by the

---

[8] Gaskins further explained in his deposition that the fuel pellets stored on the site, all produced prior to Gaskins's employment by the Authority, had gotten wet, and therefore could not be sold as fuel, and, until they could be reshredded, could not be reused in making more fuel pellets. It is unclear from the deposition testimony whether Gaskins also conveyed this information to the ABC camera crew.

Lundell machine in Berrien County. *Id.* at 43-44. Chase testified that ABC had received a copy of a letter from the Georgia Department of Natural Resources dated March 2, 1992, to Mr. Vinson Griffin regarding the Authority's problems with that agency, which stated that, "There is one user of the fuel pellets." *Id.* This statement, presumably reliable, contradicts ABC's broadcast statement that "no one found a buyer" for the fuel pellets.

There is therefore an accumulation of evidence and appropriate inferences that support the existence of actual malice in this case. ABC's motion for summary judgment on the issue of actual malice must be denied.

Upon the foregoing,

IT IS ORDERED

That defendants' February 7, 1994, motion for summary judgment (docket number 41) is granted to the extent that plaintiff's claims founded on the third challenged statement are dismissed and denied in all other respects.

April 13, 1994.

/s/ JOHN A. JARVEY
John A. Jarvey
Chief Magistrate Judge
UNITED STATES DISTRICT COURT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-3473NISC
November 26, 1996

---

LUNDELL MANUFACTURING CO., ETC.,

*Appellant,*

—VS.—

AMERICAN BROADCASTING COMPANIES, ETC.,

*Appellee.*

---

Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. Chief Judge Richard S. Arnold, Judge McMillian, and Judge Murphy would grant the suggestion.

The petition for rehearing by the panel is also denied.

Judge Magill took no part in the consideration or decision of this case.

Order Entered at the Direction of the Court:

/s/ MICHAEL E. GANS
Clerk, U.S. Court of Appeals, Eighth Circuit